



Commonwealth of Massachusetts

State Ethics Commission

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PUBLIC ENFORCEMENT LETTER 96-1

Dear Mr. Barletta:

As you know, the State Ethics Commission ("Commission") has conducted a preliminary inquiry concerning whether you violated the state conflict of interest law, G.L. c. 268A, by providing compensation to Douglas Zoning Board of Appeals ("ZBA") member John Beukema ("Beukema") in relation to a particular matter in which the Town of Douglas was a party or had a direct and substantial interest, and which was a subject of Beukema's official responsibility as a ZBA member. Based upon the preliminary inquiry, the Commission voted on May 9, 1995 that there is reasonable cause to believe that you violated §17(b) of G.L. c. 268A. The Commission, however, does not believe that further proceedings are warranted. Instead, the Commission has determined that the public interest would be better served by bringing to your attention, and to the attention of the general public, the facts revealed by the preliminary inquiry and by explaining the application of the law to such facts, with the expectation that this advice will ensure your understanding of and future compliance with the conflict of interest law. By agreeing to this public letter as a final resolution of this matter, you do not admit to the facts and law discussed below. The Commission and you have agreed that there will be no formal action against you in this matter and that you have chosen not to exercise your right to a hearing before the Commission.

IA Facts

1a You are the president of Douglas Environmental Associates, Inc. ("DEA"). At the time here relevant, DEA was developing a proposed landfill and recycling facility to be located on nearly 290 acres on the north side of Route 16 in Douglas. Browning-Ferris Industries, Inc. ("BFI") was the proposed operator of the landfill and recycling facility.

2a John Beukema ("Beukema") was, during the time here relevant, a member of the Douglas Zoning Board of Appeals ("ZBA").^{1/} At the time here relevant, ZBA members were designated special municipal employees as defined in G.L. c. 268A, §1(n).^{2/} Beukema was also self-employed as an architect, with an office in Douglas, and did business as JN Albert Associates.

3a At the time here relevant, Mark Conley ("Conley") was a BFI employee who managed BFI's involvement in the Douglas project. Conley was primarily responsible for the development of the recycling portion of the Douglas project.

4a Sometime in mid-1991, Conley recommended to you that Beukema be hired to design the recycling buildings, in part because Beukema was a Douglas resident and it would be good public relations to utilize "local talent."^{3/} You approved Conley's recommendation.^{4/}

5a In September 1991, Beukema, d/b/a JN Albert Associates, entered into an Architectural Service Agreement ("Service Agreement") with BFI to design the buildings for the recycling facility. Pursuant to the

Service Agreement, Beukema was to be paid a fee of \$2,920 for the design of the recycling buildings.^{5/} The Service Agreement further provided, “When requested, the architect shall assist the owner in acquiring necessary permits.”^{6/}

6a After entering into the Service Agreement, Beukema proceeded to draw up plans for the recycling buildings and site layout.^{7/}

7a Pursuant to the Service Agreement, in 1992, Beukema prepared an application to the ZBA for a special permit (Site Plan Review) for the proposed recycling center under Section VI 6:02 of the Douglas Zoning Bylaw.^{8/} The special permit application named you as the applicant. Beukema signed the application on your behalf on July 13, 1992, and filed it with the ZBA. The application was received by the ZBA on July 16, 1992. The ZBA then scheduled a public hearing on the matter for August 12, 1992, and gave public notice of the meeting by posting and newspaper advertisement between July 22, 1992, and August 5, 1992.

8a On August 12, 1992, you, Beukema, Conley and DEA Project Manager Sean O’Hearn (“O’Hearn”) attended the ZBA public hearing relating to the recycling center.^{9/} Beukema, as your architect, made a presentation to the ZBA describing the recycling center and responded to questions from the ZBA and members of the public.

9a Near the end of the August 12, 1992 ZBA public hearing, a member of the public questioned whether Beukema was “going to sit” as a ZBA member on the special permit application matter and whether that would be a conflict of interest. In a response, ZBA Chairman Bacon stated that Beukema would not vote on the matter and that, because ZBA members had been designated as special municipal employees, Beukema’s being the special permit applicant’s architect did not create a conflict of interest. Bacon was then asked if the ZBA had consulted the Commission on the issue and Bacon responded “no”.^{10/}

10a Beukema abstained from any participation in the recycling center matter as a ZBA member. On September 22, 1992, the ZBA, without Beukema participating, unanimously approved the special permit subject to several conditions.

11a Although the Service Agreement was between Beukema, d/b/a JN Albert Associates, and BFI (rather than you or DEA), you, in your capacity as DEA’s president, caused DEA to make at least two payments to Beukema pursuant to the Service Agreement. In October 1991, you signed a DEA check paying JN Albert Associates \$1,000. In November 1992, you signed a DEA check paying JN Albert Associates \$1,280. Both payments by DEA were made in response to JN Albert Associates’ invoices to BFI, which were forwarded to DEA.

12a You cooperated fully with the Commission’s investigation of this matter.

IIA Discussion

As a ZBA member, Beukema was a special municipal employee. As such, Beukema and, under some circumstances, private parties doing business with him (such as yourself), were and are subject to the conflict of interest law, G.L. c. 268A.

Section 17(a) of G.L. c. 268A prohibits a municipal employee from, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly receiving or requesting compensation^{11/} from anyone other than the municipality or a municipal agency in relation to any particular matter^{12/} in which the municipality is a party or has a direct and substantial interest. Section 17(b) of G.L. c. 268A prohibits anyone from knowingly giving, offering or promising compensation to a municipal employee which the employee is prohibited from receiving under § 17(a).^{13/} Section 17 further provides that a “special municipal employee”, such as Beukema, is only subject to § 17(a) in relation to a particular matter (a) in which he has participated as a municipal employee, or (b) which is or within one year has been a subject of his official responsibility, or (c) which is pending in the municipal agency in which he is serving (provided he has served more than 60 days during any 365 consecutive day period).^{14/}

The special permit site plan review for the landfill recycling facility, for which Beukema applied on your behalf with the ZBA in July 1992, was a particular matter in which the Town of Douglas was a party and had a

direct and substantial interest. That particular matter, at the time Beukema represented you before the ZBA (on August 12, 1992) and at the time he received compensation from DEA (in November 1992), was (or within one year had been) a subject of Beukema's official responsibility as a ZBA member.^{15/} This was the case even though Beukema abstained from participating in the particular matter as a ZBA member. Therefore, condition (b) of the special municipal employee provisions in §17 was satisfied and §17(b) prohibited you from knowingly,^{17/} directly or indirectly, providing compensation to Beukema in relation to the special permit site plan review application. Accordingly, there is reasonable cause to believe you violated G.L. c. 268A, §17(b) by, as DEA's president, causing DEA to compensate Beukema.^{18/}

IIIA Disposition

Based upon its review of this matter, the Commission has determined that this public letter should be sufficient to ensure your understanding of and future compliance with the conflict of interest law.^{19/}

This matter is now closed.

DATE: August 3, 1995

^{1/} Beukema served as an associate member of the ZBA until October 1989, when he became a full member. Beukema no longer serves on the ZBA.

^{2/} The Douglas selectmen designated ZBA members as special municipal employees in February 1990 in response to a request that month for such designation from ZBA Chairman Lawrence Bacon ("Bacon"), which followed Beukema's individual request for special municipal employee status. According to Beukema, he decided to make this request after attending a Commission seminar given to Town of Douglas officials and employees (including ZBA members) in December 1989, at which, among other topics, special municipal employees status was generally discussed; in particular, Beukema sought special municipal employee status in order to be able to seek the contract for the design of the new town police station which was advertised for bid in late 1989. According to Beukema, it was his understanding from the seminar that if he had special municipal employee status he would be able, as an architect, to enter into contracts with the town and appear as an architect before town boards, including the ZBA. Thus, Beukema apparently misunderstood what was said at the seminar concerning the effect of special municipal employee status. To the degree that Beukema believed that special municipal employee status would permit him to appear before his own board, the ZBA, and to receive compensation for work subject to review by that board, Beukema was mistaken.

^{3/} According to Beukema and Conley, the two had first met in 1990 when Beukema submitted a bid for the design of a home Conley was having built. Conley was favorably impressed by Beukema's work, although he selected another architect. Thus, in 1991, when Conley solicited bids from architects for the design of the recycling buildings, he asked Beukema to submit a bid. According to Conley, Beukema submitted the lowest bid.

^{4/} According to Beukema and Conley, prior to Beukema's hiring they discussed whether there would be any problem with Beukema designing the recycling buildings and being a ZBA member. Beukema told Conley that there would be no ethical problem because he was a special municipal employee. In addition, Beukema told Conley that he thought that the recycling buildings' design plans would require only approval by the town building inspector, and not the ZBA. This discussion between Conley and Beukema was not, however, related to you at the time of Beukema's hiring. According to you, at the time you approved Beukema's hiring, you did not know that he was a ZBA member or that the recycling buildings' plans would require ZBA approval.

^{5/} The Service Agreement also provided that Beukema was to be paid by the hour for additional work.

^{6/} This was apparently standard language in the contract form used by Beukema for the Service Agreement.

^{7/} According to Beukema, it was at this time that he first learned that the proposed recycling buildings would require a special permit site plan review by the ZBA. According to Beukema and Conley, when Beukema learned that special permit site plan review by the ZBA would be required in order to obtain a building permit for the recycling buildings, Beukema discussed with Conley whether or not there would be an ethical problem if Beukema presented the special permit site plan review application to the ZBA. Beukema told Conley that there would not be an ethical problem because Beukema was a special municipal employee and would abstain from participating as a ZBA member in the ZBA's review of the application.

^{8/} By this time, you were aware that Beukema was a ZBA member and that a special permit from the ZBA was required. According to you and Conley, however, Conley advised you, in turn based upon what he had been told by Beukema, that there was no ethical problem in Beukema applying for the special permit and appearing before the ZBA because Beukema was a special municipal employee and would not participate in the special permit matter as a ZBA member.

^{9/} According to you, at a meeting on the morning of August 12, 1992, in preparation for the ZBA meeting, Beukema personally told you and O'Hearn that his appearing on your behalf before the ZBA would not create an ethical problem because he was a special municipal

employee and he would not participate in the special permit matter as a ZBA member.

^{10/} Neither Bacon (who had also attended the December 1989 Commission seminar) nor Beukema had sought or received advice from the Commission or Douglas' town counsel regarding whether Beukema, as a ZBA member and special municipal employee, could be the architect for a private client on a project requiring a permit from the ZBA or could appear for a client before the ZBA. Instead, both Beukema and Bacon apparently relied on their shared understanding of the general discussion of "special municipal employee" status at the December 1989 Commission seminar in concluding that Beukema could act as Barletta's architect on the special permit application. You, in turn, relied on what was said by Beukema, Bacon and Conley concerning the conflict of interest issue and did not seek further advice on the issue.

^{11/} "Compensation" means any money, thing of value or economic benefit conferred on or received by any person in return for services rendered or to be rendered by himself or another. G.L. c. 268A, §1(a).

^{12/} "Particular matter" means any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property. G.L. c. 268A, §1(k).

^{13/} Section 17(b) states "No person shall knowingly, otherwise than as provided for the proper discharge of official duties, directly or indirectly give, promise or offer such compensation."

^{14/} The 60-day requirement applies only to condition (c) and is not here relevant. Condition (b) of the special municipal employee provisions in §17 was met as described *infra*.

^{15/} "Official responsibility" means direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and whether personal or through subordinates, to approve, disapprove or otherwise direct agency action. G.L. c. 268A, §1(j).

^{16/} The Commission has held that "the keynote of official responsibility is the §potentiality' of directing agency action and not the actual exercise of power," *EC-COI-87-17*; i.e., that "official responsibility" turns on the authority to act, not on whether that authority is, in fact, exercised. *EC-COI-92-36*. Thus, the test to determine whether an employee has "official responsibility" for a matter is whether the particular matter falls within the public employee's authority, regardless of whether that authority is exercised. *Id.* Accordingly, regular members of a municipal board, such as Beukema, retain "official responsibility" for matters which are pending before the board, whether or not they have actually worked on the matter as a board member and whether or not they actually sat on the board on a given day. *Id.*; see, e.g., *EC-COI-89-7*; *84-48*. Thus, such a regular municipal board member may not avoid "official responsibility" for a matter by abstaining from participation in the matter as a board member. *Id.*

^{17/} The Commission has not previously decided the question of what "knowingly" means in §17(b). (It should be noted that the word "knowingly" does not appear in §17(a) or §17(c).) It is, however, well-established in the law that the use of the word "knowingly" does not require that a person know that his actions violate the law or that the person intends to violate the law. "Knowingly" when used in a statute "imports a perception of the facts requisite to make up the crime ... but contains no element of purpose to violate the law." *Commonwealth v. McKnight*, 283 Mass. 35, 39 (1933) (citations omitted); *Commonwealth v. Altenhaus*, 317 Mass 270, 273 (1940).

^{18/} By the time DEA made the November 1992 payment to Beukema, you knew that Beukema was a ZBA member, that the recycling center matter involved the interests of the town, and that the matter had been before Beukema's board for special permit site plan review. Thus, you had the requisite knowledge about the relevant facts to be said to have knowingly provided Beukema with compensation that he was prohibited from receiving under §17(a). What you were mistaken about (along with Beukema, Conley and Bacon) was how the law (G.L. c. 268A, §17) applied to the facts of Beukema's situation. As set forth above, based on what you were told by the others, you mistakenly believed that, because Beukema was a "special municipal employee" and was going to abstain from the matter as a ZBA member, Beukema did not have a conflict of interest law problem in representing you before the ZBA. This mistake of law does not, however, alter the conclusion that there is reasonable cause to believe that you knowingly caused DEA to give to a Douglas town employee (Beukema) compensation in relation to a particular matter in which the town of Douglas was a party, in violation of §17(b). It is, however, a mitigating circumstance which the Commission has considered in determining how this matter should be resolved. See *infra*.

^{19/} The Commission is authorized to impose a civil fine of up to \$2,000 for each violation of G.L. c. 268A. The Commission chose to resolve this matter with a public enforcement letter due to the unusual circumstances here presented. Thus, you are a private person who hired a public employee, at first not knowing he was a public employee or that the matter as to which you had hired him would come before his municipal board, and then continued to deal with the public employee (and caused that employee to be compensated) in reliance, in part, upon the employee's mistaken representations (and those of the employee's board's chairman) that there was no conflict of interest problem in the employee representing you before his own board because he was a special municipal employee and would not officially participate in the matter as to which you privately employed him. Furthermore, the Commission has had very few public cases concerning the meaning of §17(b) (in contrast to its many §17(a) and §17(c)-related cases) and it may have been unclear to the general public that your conduct as a private business person dealing with a public official, as described in this letter, was prohibited. The Commission also notes your full cooperation with the Commission's investigation of this matter.